

STATE OF MICHIGAN
IN THE SUPREME COURT

NOV 2002

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MARCIA SNIECINSKI,

Plaintiff-Appellee,

v.

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 119407

Court of Appeals No. 212788 C

Wayne Circuit No. 96-616254-CZ
(Hon. Marianne O. Battani)

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**BRIEF OF *AMICI CURIAE*
AUTOMOBILE CLUB OF MICHIGAN and
DAIMLERCHRYSLER CORPORATION**

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STATEMENT OF INTEREST

The Automobile Club of Michigan (“the Auto Club”) and DaimlerChrysler Corporation (“DaimlerChrysler”) are major Michigan employers. The Auto Club and its parent and subsidiary companies employ over 4,000 employees at many locations throughout Michigan. DaimlerChrysler and its financial subsidiary employ over 40,000 employees at numerous Michigan facilities. Both the Auto Club and DaimlerChrysler are, from time to time, sued for alleged employment discrimination violative of Michigan’s Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., and have a concrete interest in the development of the law interpreting that statute. Both have previously filed amicus briefs in this Court in cases involving issues of paramount importance to themselves and the community of Michigan employers, as well as to citizens of our State generally.

This case presents three such issues. First, the opinion below demonstrates that Michigan’s appellate courts require additional guidance from this Court concerning the proper analysis when a plaintiff bases her prima facie case of employment discrimination upon asserted “direct” rather than circumstantial evidence. More particularly, this Court should underscore the distinction between those statements of employer representatives that are genuine “direct” evidence that an employment decision was discriminatory, and those that are mere “stray remarks” incapable of supporting a reasonable inference that a discriminatory motive was a factor in the challenged decision. Uncritical application of legal principles in these commonly recurring areas can and does lead to unwarranted jury trials and unsupportable verdicts.

Second, this case gives this Court an opportunity to clarify the burdens of plaintiffs and defendants in Elliott-Larsen cases with respect to the affirmative defense of failure to mitigate damages, especially in a case where (as here) the plaintiff admits she made no contemporaneous effort to find other employment. The opinion of the Court of Appeals distorts the law and invites confusion by holding that Plaintiff met her obligation to mitigate economic damages from 1996 forward, merely because she undertook a limited job search in 1994 and two years later enrolled in college on a casual basis. Properly viewed, Plaintiff's mitigation efforts in this case were so minimal and so far from "reasonable" that this Court should hold she was disqualified as a matter of law from recovering economic damages.

Third, this case provides this Court with an ideal vehicle to establish a minimum level of proof as a prerequisite to recovery of compensatory damages for emotional distress in Elliott-Larsen lawsuits. Here, Plaintiff's entire testimony on emotional distress takes up less than one page and is focused solely on her sense that she was "humiliated" by having to face her former co-workers when she returned to work after missing a window of opportunity to transfer to a more desirable position. For that, the jury awarded her \$90,000. While imposing a rigid framework on such jury evaluations may be unrealistic, at a minimum this Court should – as Judge Sawyer urged in his dissenting opinion below – articulate a requirement that awards of compensatory damages for emotional distress be supported by evidence detailing the distress in more than conclusory terms and describing some objective manifestation of the distress.

I. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

For purposes of this Brief, your amici accept the facts outlined at pages 3-11 of Defendant-Appellant's Brief on Appeal. It is helpful, however, to summarize the chronological relationship of certain events because of their importance to the legal arguments that follow.

A. The Events Preceding Plaintiff's Separation From BCN

Plaintiff, who was employed as a telephone marketing representative by Blue Care Network of Eastern Michigan ("BCN"), had a complicated pregnancy in 1989 and was on medical leave for approximately 7 months. She began another pregnancy in 1992, but miscarried in February 1993 (124-126a). Plaintiff became pregnant again in the summer of 1993.

During the summer of 1993, in connection with a plan to merge BCN's marketing department into the marketing department of BCN's parent company, Defendant Blue Cross and Blue Shield of Michigan ("BCBSM"), marketing representatives employed by BCN applied for positions in BCBSM's marketing department. Plaintiff sought a position as an Account Representative (AR) for BCBSM.

At her first interview on August 18, 1993, she was interviewed by BCBSM Regional Sales Director Donald Whitford, BCBSM Sales Team Manager Donald Roseberry, and Michael Curdy who had been Plaintiff's supervisor at BCN for at least the prior two years. Together, it was the responsibility of these three interviewers to decide which BCN marketing employees would end up in which BCBSM marketing positions (360-361a). Plaintiff had a second interview with only Whitford and Roseberry on August 25, 1993. At the end of this second interview, Whitford and Roseberry

congratulated Plaintiff and told her she had been awarded the AR position in Saginaw and Tuscola Counties. Plaintiff accepted the offer, and then told them that she was pregnant (139a – 142a).

Less than three weeks later, on approximately September 10, 1993, Plaintiff began having medical complications with her pregnancy and took time off work (146-147a). Although it was not anticipated in September, Plaintiff remained unable to work for medical reasons from September 10, 1993 through May 26, 1994 – six weeks after she gave birth (224a).

From September 10, 1993 until March 1, 1994, the AR position in Saginaw and Tuscola Counties which Plaintiff had hoped to occupy was reserved for her by BCBSM. Plaintiff was listed on a December 1993 organization chart (461a). And a December 8, 1993 letter authored by Roseberry plainly contemplated Plaintiff's return and made temporary assignments for co-workers to handle calls from Plaintiff's groups during her absence (462a).

Beginning in September 1993, Plaintiff received short-term disability benefits ("STD") under the group plan available to BCN employees. Plaintiff could not officially become a BCBSM employee until she actually began work at BCBSM (447-449a). Thus, when BCN processed paperwork in November 1993 to separate BCN marketing employees so that they were formally "hired" as BCBSM employees, Plaintiff remained on the BCN payroll in order to continue her STD benefits (396-397a; 445-449a). But Plaintiff's STD benefits extended for only five full months. Once Plaintiff exhausted this maximum period for receiving STD benefits, BCN converted her to long term disability status ("LTD") and, in accordance with the LTD plan, administratively terminated her

employment. This meant that she lost her status as a BCN employee (all marketing positions had by this time been transferred to BCBSM) and correlatively lost the right to step into the AR position at BCBSM – where she had never actually become employed.

As your amici understand the record, there is no evidence that Plaintiff's separation from BCN was anything other than an administrative measure that was consistent with the uniform application of the STD and LTD programs involved, and the terms of the respective benefit plans. In a real sense, Plaintiff was the victim of an unfortunate confluence of circumstances involving her medical condition, the timing of the merger, and the terms of various programs and plans. Nor is there any evidence that Messrs. Curdy, Roseberry, or Whitford had any role in deciding whether or when this administrative action would be taken. Indeed, the testimony of BCN Human Resources Manager Patricia Stone makes clear that Plaintiff's separation was essentially a ministerial process initiated by a BCN benefits specialist (392a).

B. The Remarks Plaintiff Maintains Are “Direct Evidence.”

Plaintiff claims that she presented direct evidence of pregnancy discrimination by BCBSM in 1994 when she described several comments allegedly made by her BCN supervisor, Michael Curdy -- who by her own account gave her positive evaluations and was good about letting her take child-related time off (204 – 210a). Almost all of the comments precede Plaintiff's being awarded the AR position in August 1993. According to the Court of Appeals (47a), Plaintiff's “direct evidence” was this:

- When Plaintiff announced her second pregnancy in 1992, Curdy seemed upset and stated, “I’m not going [to] let anyone sit here again. It seems to be the pregnancy chair” [see 128 – 130a]. Curdy also asked her if she was going to have more problems with her pregnancy “like [she] had in 1989.”

- At a later time “Curdy said that Plaintiff was not going to be allowed to use any sick time or unpaid leave for pregnancy.”
- “When Plaintiff returned after having a miscarriage in February 1993, Curdy raised the issue of her pregnancies” and said in the event of future pregnancies “we’ll have to deal with that problem when it comes” [see 130 – 131a].
- At the end of Plaintiff’s first interview for the AR position in August 1993, Curdy asked to “discuss an issue” and told Plaintiff, “You have problems with the pregnancies and we need to discuss the attendance of that.” Curdy also asked her if she thought her pregnancies would be a problem in the future [see 137 – 138a].
- After Plaintiff announced she was pregnant again in August 1993, Curdy said to her, “I guess I shouldn’t hire women in their child-bearing years.”

C. The Events Following Plaintiff’s Third Pregnancy

Plaintiff’s second child was born on April 9, 1994 (150a). On May 20, 1994, she telephoned BCN Human Resources Manager Patricia Stone to inquire about her status (154-155a). BCN, of course, no longer had any marketing positions because they had been transferred to BCBSM. The BCBSM AR position once reserved for Plaintiff had not been filled, but, even if special arrangements to place Plaintiff had been a theoretical possibility, Stone was told that the position could not be filled at that time because of a company-wide hiring freeze related to other major organizational changes at BCBSM (435a). During this period, Plaintiff made no direct contacts with BCBSM personnel inquiring as to placement into the BCBSM marketing position.

Over the next six months, Plaintiff collected unemployment benefits and made intermittent efforts to find other employment. She spoke to four companies to see if they had openings, kept in contact with BCN Human Resources, and “went through the yellow pages” and contacted a “variety of other sources,” none of which she could identify at trial (236-237a). In December 1994, following a call from BCN Human

Resources, Plaintiff was re-hired by BCN in a non-group marketing representative position, which she continued to hold until September 1996. After obtaining that position, she ceased all efforts to look for any other work at BCBSM or elsewhere (237a).

In March 1996, Plaintiff filed this lawsuit complaining that BCBSM denied her the AR position because of pregnancy discrimination (170a). In August 1996, Plaintiff became upset when she saw a posting for an AR position at BCBSM equivalent to the one she had been offered three years earlier and noted that the posting included a college degree requirement -- something she lacked. She contacted a BCBSM Human Resources Representative and was told that the degree requirement could not be waived. Plaintiff regarded this as "the straw that broke the camel's back"; she resigned from BCN effective September 20, 1996, even though the job she had held at BCN for nearly two years clearly remained available to her.

From September 1996 through the March 1998 trial, Plaintiff remained unemployed and made no effort to look for any type of work. During that period, she enrolled in three college classes, one of which she failed (244 – 245a).

The jury concluded that Plaintiff had been discriminated against based on pregnancy and awarded Plaintiff \$125,000 for past economic losses; \$136,000 for future economic losses, and \$90,000 for non-economic losses (42 – 43a).

II. ARGUMENT

A. **A Directed Verdict Or JNOV Should Have Been Granted Because A Reasonable Jury Could Not Have Concluded, On This Record, That Plaintiff Was Excluded From The Account Representative Position At BCBSM Because Of Pregnancy-Related Discrimination.**

The Court of Appeals panel opinion recited generally accepted principles concerning the role of direct evidence in discrimination cases, drawing on the watershed Michigan case authored by then Judge (now Justice) Young (47a):

Intentional discrimination may be established by direct or indirect evidence. . . . *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *Harrison*, *id*, 610. In a case involving direct evidence of discrimination, the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus, and that the discriminatory animus was causally related to the decision maker's action. *Id*, 612. Once a plaintiff has met the initial burden of proving that the illegal conduct was more likely than not a substantial or motivating factor in the defendant's decision, a defendant has the opportunity to demonstrate by a preponderance of the evidence that it would have reached the same decision without consideration of the protected status. *Id*, 611. However, once the plaintiff has submitted direct evidence of discrimination, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. *Id*, 613. [Footnotes omitted.]

But the Court of Appeals panel glaringly misapplied these principles, both in finding that Plaintiff had testified to "direct evidence" in the first place and in concluding that this mischaracterized "direct evidence" was causally related to the decision Plaintiff claimed was discriminatory. First, the panel held that Curdy's statements (quoted above) constituted "sufficient direct evidence of defendant's discriminatory predisposition and animus based on plaintiff's pregnancy and pregnancy-related complications to submit the case to the jury" (47a). Second, the panel held there was sufficient evidence to establish the required causal relationship between that supposed

“discriminatory predisposition” and Plaintiff’s inability to return to the BCBSM AR position in the spring of 1994 because:

- “[A]fter hearing that Plaintiff was pregnant in August 1993, Curdy and Whitford called an HR Manager to inquire about placing a discipline notice regarding absenteeism in Plaintiff’s file dating back to January 1993” (48a);
- “While on medical leave, Plaintiff left numerous messages for Curdy, Whitford and Roseberry to inquire about her AR position, but did not receive any return calls” (id).

But this evidence is plainly insufficient to allow a jury to leap to the conclusion that “Curdy acted on a discriminatory predisposition when Plaintiff was discharged from the AR position,” as the Court of Appeals so neatly but misguidedly put it. The record leaves no room for dispute that Plaintiff was not “discharged” but rather was unable to assume the AR position for non-discriminatory reasons arising from the terms of the applicable disability plans, apparently in combination with a BCBSM hiring freeze that was in effect when she was finally able to return to work nearly three months after her separation from BCN. Nor is there evidence even remotely linking Curdy (or Whitford or Roseberry), who participated in awarding Plaintiff the AR position some six months earlier, with those events, and the panel’s opinion identifies none. Curdy’s efforts to retroactively document his concerns about Plaintiff’s attendance problems in January 1993 cannot conceivably establish a discriminatory motive for the 1994 action if Curdy had nothing to do with that action, as the record indisputably shows. Plaintiff’s speculation that Curdy had somehow “poisoned” Whitford’s mind and that one or both of them had been involved in “revoking” the AR job offer was (as she conceded) nothing but her subjective personal opinion and conclusion (251 – 254a). Such speculation is not evidence that has any significance in opposing a dispositive motion, and it should be

given no weight here. Hazle v Ford Motor Co, 464 Mich 456, 474 (2001). Quinto v Cross & Peters Co, 451 Mich 358, 371 (1996)(conclusory affidavits labeling employment events as discriminatory without specific factual support do not establish a genuine issue of fact on discriminatory motive).

Your amici are concerned that there be no dilution of the well settled principle that a particular manager's allegedly discriminatory mind-set is irrelevant to the Elliott-Larsen liability analysis unless that manager's role in making or influencing the particular decision at issue is supported by evidence, as opposed to mere speculation. See Lytle v Malady (On Rehearing), 458 Mich 153, 184 (1998). Here, Plaintiff utterly failed to show the necessary connection (sometimes referred to as "causal nexus"). She did not contend that any discriminatory animus caused her to take and prolong the STD (and LTD) leave that prevented her from transferring to BCBSM and taking the AR position as scheduled in November 1993. She offered no evidence to contradict the testimony that her termination from BCN when her STD expired resulted from routine plan administration. And she admitted she had no evidence that Whitford, Roseberry, or Curdy played any part in these benefit-driven actions. Given this evidentiary void, the Court of Appeals plainly erred by injecting Curdy into the analysis and deeming Plaintiff's testimony about Curdy's 1992-1993 statements as direct evidence "requir[ing] the conclusion that unlawful discrimination was at least a motivating factor" in Plaintiff's not being placed in the BCBSM AR position in May 1994.

The federal courts have carefully applied the essential and straightforward logic of this "causal nexus" requirement in numerous cases, and Michigan courts should be directed to follow their lead. For example, in Holbrook v Reno, 196 F3d 255, 260-261

(CA DC 1999), the plaintiff was removed from FBI Special Agent training because an investigation concluded that she had misleadingly answered questions about her relationship with a male trainer and had disobeyed an order. She attempted to base a sex discrimination claim on “direct evidence” that the primary trainer for her class had made discriminatory and sexually charged comments. The U.S. Court of Appeals rejected this avenue of proof because “the record contain[ed] no evidence that [the primary trainer] participated in the Bureau’s decision that Holbrook was unsuitable to become an FBI Agent.” Moreover, even if his report of a suspected relationship played some part in initiating an investigation (which was soon closed), Holbrook received discipline only after the investigation was reopened when she amended a previous statement. Thus, the “chain of causation” between the maker of the comments and the challenged action was broken. See also, Hall v Giant Food, 175 F3d 1074, 1077 (CA DC 1999) (a supervisor’s ageist remarks could not be considered evidence of discrimination because the decision to discharge the plaintiff was made by a higher manager who “made an independent assessment” of the plaintiff’s conduct).

In Wilson v Stroh Companies, Inc., 952 F2d 942 (CA 6 1992), the plaintiff, a union steward terminated for insubordination, claimed that his plant manager was “out to get him” because of racial animus. The Sixth Circuit held that the “causal nexus” necessary to support Wilson’s prima facie case was absent because, even if the plant manager harbored racial animus, the record indisputably showed that Wilson was terminated by higher company officials who conducted an independent investigation of the underlying events.

This “causal nexus” requirement also figures prominently in the analysis courts should employ to differentiate between “direct evidence” and “stray remarks,” which the Court of Appeals did not recognize or employ in the instant case. In Krohn v Sedgwick James, Inc., 244 Mich App 289, 291 (2001), the leading Michigan decision on this subject, the plaintiff claimed that a statement made by her former supervisor – “out with the old and in with the new” – was direct evidence that she was fired because of her age. Affirming the trial court’s decision to exclude the remark, and summarizing federal precedent, the Court of Appeals held that Michigan courts should assess the relevance of putatively discriminatory statements by the defendant’s employees in light of the following factors:

(1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias? Id at 292.

The Krohn panel noted prominently that the speaker “was not [Krohn’s] supervisor when she lost her job[,] . . . and no evidence suggests that he had any decisionmaking authority regarding the discharging of plaintiff.” Id at 301. Indeed, it should be clear that, if the causal nexus requirement is not satisfied when the first factor is examined, looking to the remaining criteria makes little sense.¹

¹ This Court found a remark to be direct evidence of age discrimination in DeBrow v Century 21 Great Lakes, Inc (After Remand), 463 Mich 534 (2001). The plaintiff in DeBrow testified that, as he was being removed from his executive position his highly placed superior said to him, “You’re too old for this shit.” As Justice Young had pointed out in a dissenting opinion when the case was in the Court of Appeals, that statement, made by an individual involved in the discharge decision during the very discussion in which the decision was being communicated, could reasonably be construed as evidence that age was a factor considered by the employer in making the removal

In the instant case, the Krohn analysis leads to the conclusion that Curdy's statements are not only devoid of direct evidence, but are entirely irrelevant.² As to the first factor, the complete absence of evidence that Curdy had anything to do with the decisions or actions that prevented Plaintiff from becoming an AR for BCBSM should itself be dispositive. As to the third factor, Curdy's few remarks were scattered over a period of more than a year, with the last made at least five months before Plaintiff's STD benefits expired on March 1, 1994. As to the second and fourth factors, the remarks cannot be treated as "a pattern of biased comments"; even in the light most favorable to Plaintiff, they were ambiguous remarks and did not clearly reflect discriminatory animus.

Bear in mind that Plaintiff had a problem pregnancy in 1989, several years before the events in question. For Curdy to ask her, when she announced her next pregnancy in 1992, whether she might again have similar problems, might be viewed as insensitive or even presumptuous, but it cannot be viewed as evidence that Curdy was biased against pregnant employees. There was no evidence that Curdy harbored such a bias or ever took any adverse employment action against Plaintiff. Likewise, for Curdy to say in reference to possible future complications, "we'll have to deal with that problem when it comes," is only to state the obvious. That pregnancy and related complications are not a permitted basis for discrimination does not mean that managers can never breathe a word about the operational challenges that pregnancy-related absences create or use the word "problem" to describe them without creating liability. Similarly,

decision. It arguably falls near one end of the spectrum. However, the DeBrow case did not require an extended analysis by this Court of the requisites of direct evidence or what distinguishes it from stray remarks. As the present case illustrates, such an analysis is needed and long overdue.

² Krohn was decided about six weeks before the Court of Appeals issued its opinion in this case, but the Sniecinski panel did not advert to it.

when Curdy spoke of Plaintiff's "having a problem with [her] pregnancies" that raised attendance concerns at the close of the August 1993 job interview, he was simply stating a fact. And Curdy's 1992 joke that he would not allow women to sit in a particular chair because it seemed to be a "pregnancy chair" cannot be viewed as animus against pregnant women, though some might find its humor to be boorish.

This Court should endorse the Krohn test and apply it in this case. Under that test, Curdy's remarks were legally insufficient to show discrimination in the 1994 events that gave rise to this lawsuit. Such an explication would be of great value in guiding the lower courts with respect to these frequently recurring issues.

B. The Court of Appeals' Holding That Plaintiff Had Made Sufficient Efforts To Mitigate Her Damages, On This Record, Grossly Distorts The Law Of Mitigation.

It is undisputed that Plaintiff voluntarily quit her job at BCN effective September 20, 1996. The Court of Appeals held that this was not a constructive discharge and Plaintiff never attempted to argue that it was (48a). Plaintiff nevertheless persuaded the jury to accept (and the lower courts not to disturb) a calculation of her economic damages that essentially disregarded Plaintiff's voluntary resignation. Plaintiff's counsel argued to the jury that, when she quit her job with BCN in September 1996, Plaintiff was going to pursue her college degree, and would complete it at the end of the year 2000. From that point forward, he said, the jury could assume that Plaintiff would fully mitigate her economic damages from not obtaining the AR position at BCBSM. Meanwhile, while she was pursuing a degree, the jury should award Plaintiff the full compensation she lost by not obtaining the AR position at BCBSM, without regard to whether she had

given up her BCN employment or was seeking other employment at BCBSM or elsewhere (356b). This makes no sense.

Plaintiff's counsel argued to the jury that Plaintiff's "past damages," i.e. back pay, would be \$124,812.97; and that her "future damages," i.e. front pay, would be \$136,367.29 (356b). The jury's verdict exactly matched the economic damages Plaintiff's counsel had requested, rounded to the nearest thousand (381b).

BCBSM sought remittitur in the trial court, arguing that despite her counsel's creativity Plaintiff was not entitled to recover back or front pay beyond the date of her September 1996 resignation. Most fundamentally, her admission that she made no effort to find other employment after voluntarily resigning should act as a complete bar to an award. Additionally, even if a plaintiff's diligent pursuit of a college degree could theoretically, in rare circumstances, be found to constitute a reasonable effort to mitigate damages, Plaintiff indisputably had done no such thing. In the eighteen months between her resignation and the trial, Plaintiff had enrolled in just three courses – two in sign language and one marketing course that she failed (244–245a, 460a).

The Court of Appeals' rejection of BCBSM's mitigation argument relied heavily on the general maxims that (1) a plaintiff's duty is to make reasonable efforts under the circumstances to mitigate damages by seeking and accepting replacement employment, (2) the defendant bears the burden of proof on failure to mitigate, and (3) the adequacy of the plaintiff's efforts is usually a question for the fact finder. See Morris v Clawson Tank Co, 459 Mich 256, 264-266 (1998). In this case, however, the Court of Appeals applied these uncontroversial principles in startling ways that led to an absolutely unacceptable outcome. First, the panel held that Plaintiff had shown

reasonable efforts to mitigate her damages during a period that began in September 1996, when she quit her job and then made no effort to find other employment, because she had made minimal efforts to find other employment between May 1994 and December 1994. That is, of course, temporally backwards. Second, the panel held that Plaintiff's post-resignation decision "to attend school full time as opposed to searching for employment" was a permissible effort "to acquire marketable skills to enter a particular labor pool" (49a).

We will return to this second point shortly. Your amici wish to stress, however, that if such an exception to a plaintiff's general obligation to seek alternative employment has any place in Michigan law, that niche must be defined very narrowly. Otherwise, employees who believed they were discriminatorily denied promotions could freely quit their jobs, pursue additional education, and then sue for the income they allegedly lost from the higher level jobs they did not obtain. Such self-improvement efforts might be laudable, but allowing them to suspend the general rules of mitigation in all but the most exceptional situations would violate the conceptual underpinnings of the mitigation doctrine - minimizing the economic harm chargeable to a defendant. Morris, 459 Mich at 263 – 264.

The Court of Appeals' decision in this case disregards or undermines several basic principles whose place in the law of damages should be reaffirmed by this Court. First, this Court should endorse the rule widely adopted by federal appellate courts that an employer has no burden to establish the availability of comparable employment where a plaintiff has admitted making no effort to seek such employment. See, Quint v A E Staley Mfg Co, 172 F3d 1, 16 (CA 1 1999) ("We believe it will be the extraordinary

case in which [a plaintiff's] decision to withdraw from the job market can be found to have been justifiable, given that virtually all reemployment prospects are plainly precluded absent some effort to reenter the job market"); Greenway v Buffalo Hilton Hotel, 143 F3d 47, 54 (CA 2 1998); Sellers v Delgado College, 902 F2d 1189, 1193 (CA 5 1990); Weaver v Casa Gallardo, Inc., 922 F2d 1515, 1527 (CA 11 1991). As the leading commentators in the field have noted, the principle that the plaintiff's inaction cuts off back pay "is analogous to estoppel; where the plaintiff fails to exercise due diligence, he or she is estopped to contend that an adequate job search would have been fruitless." Lindemann and Grossman, Employment Discrimination Law p 1793 (3d ed 1996).

Additionally, this Court should hold that job search efforts that are not contemporaneous with the period for which the plaintiff seeks damages are inadequate as a matter of law. The obligation to mitigate damages is a fundamental one, and continual effort should be required because, as time passes, economic conditions inevitably change, employer requirements change, and positions are constantly coming open and being filled -- by those who are actively seeking them.

Furthermore, while the reasonableness of an employee's overall efforts and her actions in not seeking or accepting particular employment may ordinarily be jury questions, Morris, 459 Mich at 266, it does not distort that doctrine to hold that a plaintiff's failure to seek any other employment is unreasonable as a matter of law. It serves no social policy and wastes judicial resources to compel the defendant to come forward with the detailed testimony (often given by an expert) that the plaintiff could have obtained other suitable employment with reasonably diligent efforts. Your amici

assure the Court that this is a common litigation dilemma – whether to invest substantial resources in mounting a full-blown “failure to mitigate” defense when the plaintiff has done virtually nothing – which is compounded by the reluctance of trial courts to grant motions in limine as to damages due to the lack of Michigan case law giving guidance on this subject.

What is more, even if Plaintiff's 1994 mitigation efforts were not too stale to be recognized subsequent to Plaintiff's quitting her job in September 1996, they were still completely inadequate as a matter of law. See, e.g., EEOC v Service News Co, 898 F2d 958, 963 (CA 4 1990)(looking through want ads alone insufficient to show mitigation); Booker v Taylor Milk Co, Inc, 64 F3d 860, 865 (CA 3 1995)(registering with state job service and looking through help wanted ads was not an exercise of reasonable diligence to mitigate damages); Coleman v Lane, 949 F Supp 604, 612 (ND Ill 1996)(plaintiff's four applications over a two year period and inquiry into three or four other positions was not a good faith effort to mitigate damages). Plaintiff's efforts here fall clearly on the “inadequate” side of the line, but any recognition by this Court that a trial court has the power in appropriate cases to declare a plaintiff's job-seeking actions to be inadequate (and hence a failure to mitigate barring recovery of damages) would be a clarification of great import to Michigan jurisprudence. Many trial courts have unfortunately read this Court's decision in Morris as a pronouncement that questions regarding whether a plaintiff has adequately attempted to mitigate damages must always be decided by the jury, regardless of the facts. Appellate decisions like that now under review simply reinforce that belief. However, just as the “reasonable man” test does not mean that the jury must decide in every case whether the defendant's conduct

was unreasonably dangerous, so, too, are trial courts entitled to decide in appropriate cases that a plaintiff has failed to create a jury question on the reasonableness of her efforts to mitigate.³

We now return to Plaintiff's explanation of her conduct in the lower courts. Having missed the window of opportunity to become an AR in conjunction with the 1993 merger of BCN's marketing functions into BCBSM, Plaintiff testified that she decided to seek a college degree so she would have the credentials necessary to pursue opportunities in the insurance field in the future.

The Court of Appeals relied on precedents holding that "[a] decision to attend school only when diligent efforts to find work prove fruitless" meets the duty to mitigate damages. This Court need not decide whether such a conclusion could ever be appropriate, for it is manifestly out of place here. Such cases are rare, and must involve far more extensive job-search efforts before the search is abandoned as fruitless than Plaintiff showed here. In Dailey v Societe Generale, 108 F3d 451, 453 (CA 2 1997), a case on which Plaintiff has relied on appeal, the plaintiff used outplacement services and executive recruiters, contacted many people in the industry seeking job leads, and interviewed for numerous open positions – a full-time job search campaign that positively dwarfs Plaintiff's virtually non-existent efforts here.

The Court of Appeals' holding that Plaintiff was excused from the obligation to seek other employment because she "attended school as a means to acquire

³ See Moning v Alfano, 400 Mich 425, 438 (1977)(the jury decides whether the defendant's conduct falls below the applicable standard of care "unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy"). Accord, Case v Consumers Power Co, 463 Mich 1, 7 (2000).

marketable skills to enter a particular labor pool, as opposed to simply abandoning the job market,” ignores the evidence in the record. Even if that had been Plaintiff’s original plan, at trial BCBSM demonstrated beyond any dispute that Plaintiff had totally failed to implement that plan. She had signed up for only three classes, none directly connected with the health insurance field, and had failed the only arguably relevant class (in marketing). The panel called her lack of progress “irrelevant because Plaintiff’s damages were based on four years, i.e., the time it should take a full-time student to obtain a bachelor’s degree” (50a, n3). But in the fall of 1996, Plaintiff had only between 15 and 20 credits (245a), and for one and one-half years she had done virtually nothing to further her education or enhance her relevant skills. One might well ask how long the Court of Appeals would let Plaintiff postpone a meaningful start before deciding that her haphazard college efforts were not a substitute for seeking alternative employment.

C. Plaintiff’s Proofs Do Not Support Any Award Of Compensatory Damages For Emotional Distress.

On this third point, your amici endorse the position articulated in Judge Sawyer’s dissenting opinion. Where damages for emotional distress are awarded based only on the plaintiff’s testimony, Michigan law requires “specific and definite evidence of [the plaintiff’s] mental anguish, anxiety or distress.” Wiskotoni v Michigan Nat’l Bank – West, 716 F2d 378, 389 (CA 6, 1983), citing Vachon v Todorovich, 356 Mich 182, 188 (1959). Although that general rule has not been explicitly applied in an Elliott-Larsen case, several federal circuits have recently rejected damage awards for emotional distress that were predicated entirely upon the brief and conclusory testimony of the plaintiffs. See Price v City of Charlotte, 93 F3d 1241, 1254-55 (CA 4 1996); Brady v Fort Bend

County, 145 F3d 691, 718-19 (CA 5 1998). See also, Nekolny v Painter, 653 F2d 1164, 1172-73 (CA 7 1981).

Here, Plaintiff's testimony was simply too sparse and conclusory to show any emotional injury, let alone "emotional distress" to the tune of \$90,000. She was not treated harshly or insulted in connection with the allegedly discriminatory unavailability of the BCBSM AR job. In fact, she did not even speak to BCBSM personnel at the time. She denied any impact on her personal life. She described no physical or mental disturbances. She sought no treatment. And she returned to work at BCN in an environment that she described in favorable terms.

Plaintiff merely testified to being upset and humiliated at learning from BCN that she could not be placed at BCBSM, and later having to answer questions from her co-workers at BCN about why she was not working at BCBSM as once planned.

Historically, juries have been afforded wide, though not unlimited, latitude in valuing a plaintiff's physical and mental suffering. Your amici believe that the increasing frequency of large jury verdicts calls for clearer standards and closer scrutiny of compensatory damages. The deference that such awards receive argues for reinforcing that the sine qua non for recovery is meaningful "specific and definite evidence" of injury. Plaintiff's sketchy testimony in this case does not meet that threshold, and in all events is palpably inadequate to support an award of \$90,000.

III. CONCLUSION

Your amici support BCBSM's request for relief. Because there was no direct evidence of discrimination, and indeed no evidence of discrimination at all that was worthy of any weight, BCBSM's motions for directed verdict or JNOV should have been

granted. This Court should therefore vacate the judgment as to liability. In addition, guidance from this Court on the damages and mitigation issues presented in this case would be beneficial to bench and bar. This Court should rule that a plaintiff's failure to make any effort to mitigate damages cuts off his or her ability to recover economic damages as a matter of law, and that a plaintiff's proofs must provide a specific and definite basis to entitle her to an award of compensatory damages for emotional distress.

Respectfully submitted,

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